DATO' H.M. SHAH & ORS.

v.

DATO' ABDULLAH AHMAD

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
WAN YAHYA J
[CIVIL APPEAL NO. 02-131 OF 1990]
30 OCTOBER 1990

CONTRACT: *Personal service contract - Whether termination if repudiation not accepted by employee - Whether negative covenant can be implied in an agreement - Section 55 Specific Relief Act.*

This is an appeal and a cross-appeal from the decision of N.H. Chan J delivered on 11 November 1989 and reported in [1990] 1 CLJ (Rep) 779 - 789. The issue was whether a negative covenant can be implied in a particular agreement.

Held:

[1] There is a diversity of opinion and caselaw on whether contracts of employment are excepted from the general rule that repudiation does not determine the contract until accepted.

[2] (a) The learned trial Judge based his judgment on the fact that there occurred a repudiation which was not accepted.

(b) As the matter was still at an interlocutory stage, the point whether the removal of the respondent/appellant was wrongful or according to the contract was raised but never really argued nor dealt with by the Judge.

(c) The contract between the respondent and SPK, the employer company, must also be looked at in the context of the articles of association of SPK and the Companies Act 1965.

[3] The agreement between the respondent/appellant and SPK is not the same as any ordinary employer/employee agreement; the agreement in the instant case contains a number of provisions concerning termination.

[4] On the facts evidence and agreement in this case as well as s. 55 of the Specific Relief Act an implied stipulation cannot properly be read into the agreement between SPK and A.

[5] Section 128 of the Companies Act 1965 provides for removal of a director of a public company by ordinary resolution notwithstanding anything in the company's memorandum or in any agreement between the company and the director.

[6] Therefore, an implied stipulation cannot be read into the agreement between SPK and the respondent.

[Appeal Allowed. Cross appeal dismissed.]

Cases referred to:

Broome (Selangor) Rubber Plantations v. R.H. Whitley [1919] 1 FMSLR 365
Denmark Productions Ltd. v. Boscobel Productions Ltd. [1969] 1 QB 699
Lumley v. Wagner [1843] 60 All ER 368

Pertama Cabaret Nite Club Sdn. v. Roman Tam [1981] 1 MLJ 149
Rubenstein Co. v. Francis [1930] AIR Lahore 597
Thomas Marshall (Exports) Ltd. v. Guinle [1979] 1 Ch 227
Vine v. National Dock Labour Board [1957] AC 488
Vine v. National Dock Labour Board [1956] 1 QB 658
Whitwood Chemical Company v. Hardman [1891] 2 Ch 416

Legislation referred to:
Companies Act 1965, s. 128
Specific Relief Act [Ind], s. 57
Specific Relief Act 1950, ss. 20(1)(b), 54(f), 55,

For the appellants - K.S. Narayanan; M/s. K.S. Narayanan & Associates
For the respondent - P.S. Ranjan; M/s. P.S. Ranjan & Co.

[**Editorial Note:** The following case was heard together at this Supreme Court sitting. Dato' Abdullah bin Ahmad v. Syarikat Permodalan Kebangsaan Berhad & 5 Ors. (SC Civil Appeal No. 02-141 of 1990)]

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

By a contract of employment the plaintiff in the Court below, now the appellant (Dato' Abdullah Ahmad) in SCCA No. 02-141 of 1990 was employed by Syarikat Permodalan Kebangsaan Berhad (SPK), the first defendant company in the Court below, to serve SPK as its executive chairman and managing director for a period of three years from 1 January 1989 to 31 December 1991.

SPK is a public company listed on the Bumiputra Stock Exchange and has large investments in various companies. At a meeting of the board of directors of SPK on 2 October 1989 the board removed Dato' Abdullah Ahmad as Chairman of SPK and Dato' H.M. Shah was appointed in his place. At the same meeting the board also suspended Dato' Abdullah Ahmad of his executive powers and duties as managing director of SPK.

Dissatisfied, Dato' Abdullah Ahmad sought and obtained certain *ex parte* reliefs from the High Court on 5 October 1989.

Both the appeal and the cross-appeal before us arose from the decision of the learned Judge of the High Court who after hearing *inter partes*:

(a) dissolved the *ex parte* injunction granted on 5 October 1989 concerning Dato' Abdullah Ahmad remaining in office as executive chairman and managing director of SPK and the exercise by him of the powers and duties of the holder of such office, and

(b) affirmed the *ex parte* injunction of the same date restraining Dato' H.M. Shah from acting as chairman of SPK.

There were lengthy arguments before the learned Judge and the learned Judge came out with a well researched grounds of judgment which subsequently also came to be discussed in an excellent article in the Current Law Journal [1990] 1 CLJ (Rep) cxxiv.

The conclusions of the learned Judge may be summarised simply as follows. The purported removal from office of Dato' Abdullah Ahmad as Chairman of SPK and suspension of his executive powers as managing director of the same by the board of directors of SPK on 2 October 1989 did not put an end to the contract of service between him and SPK. It only

operates as repudiation of the contract by SPK. The contract will only be determined when the repudiation is accepted by Dato' Abdullah Ahmad. Since the repudiation has not been accepted, as obviously shown by his challenge, the contract of employment still subsists. Although under our law namely s. 20(1)(b) and s. 54(f) of the Specific Relief Act 1950 (Cap. 137) specific performance in this case is not possible, Dato' Abdullah Ahmad is not prevented from applying for an injunction to enforce the performance of any implied negative undertaking in the agreement. The rationale is as follows. Because it is a contract for personal service Dato' Abdullah Ahmad is not entitled to a decree of specific performance to continue him as executive chairman and managing director. However since he has performed his contract as far as it is binding on him, although SPK's positive undertaking to employ him as Executive Chairman and managing director until 31 December 1991 cannot be enforced by specific performance, an injunction may be granted against SPK to enforce any express or implied negative undertaking by SPK. The learned Judge found on his reading of the contract of employment in question that there is on the part of SPK an implied negative stipulation not to appoint someone else as Chairman of SPK until the expiration of the period of the contract, that is, 31 December 1991. Based on his finding that there is an implied negative stipulation the learned Judge refused to dissolve the *ex parte* injunction granted by him on 5 October 1989 to restrain Dato' H.M. Shah from acting as Chairman of SPK.

The law on repudiation of a contract in a contract of employment is by no means certain and views are divided whether contracts of employment are excepted from the general rule that repudiation does not determine the contract until accepted. The opposing authorities are found in the judgment of the learned Judge.

Megarry VC in *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] 1 Ch. 227 after a detailed examination of the authorities took the view that contracts of employment are no exception to the general rule.

The other view is as expressed by Jenkins LJ in *Vine v. National Dock Labour Board* [1956] 1 QB 658 that in the ordinary case of master and servant contract because of the peculiar nature of the contract the repudiation or the wrongful dismissal puts an end to the contract and only a claim for damages can arise. On appeal Viscount Kilmuir LC said that in the ordinary master and servant case:

> if the master wrongfully dismissess the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract.

See *Vine v. National Dock Labour Board* [1957] AC 488, 500.

In *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 QB 699 both Salmon and Harman LJJ agreed that if a man employed under a contract of personal service was dismissed it is clear that he could not treat the contract as still subsisting and claim remunerations but must sue for damages for the wrongful dismissal.

At the outset of his argument in reply in the appeal in SCCA No. 02-131 of 1990 Mr. Ranjan for Dato' Abdullah Ahmad stated that circumstances had changed after the injunctions were issued. He said we were confronted with "practical realities" as events had changed in that the majority of the members of the board of SPK had by then "restored Dato' Abdullah Ahmad to his rightful place". Indeed only three directors of SPK appealed against the injunction that is Dato' H.M. Shah and two others. Nothing developed from the disclosure by Mr. Ranjan except perhaps to give the impression that the appeal may be only of academic interest.

If one goes back to basic principles the disclosure of Mr. Ranjan did highlight a vital aspect of the appeal. In a civil proceeding parties must abide by their pleadings. In this case the Court's jurisdiction is confined to the statement of claim of Dato' Abdullah Ahmad. The injunctions sought by Dato' Abdullah Ahmad were interlocutory. The defendants had not filed their defence. Paragraph 5 of the statement of claim reads as follows:

> 5. The purported removal of the plaintiff from the office of Chairman and the purported suspension of the plaintiff from the office of Executive Chairman and managing director are illegal, null and avoid and in breach of the said contract on the grounds, *inter alia*, that the plaintiff was not given sufficient notice of the said meeting and was not given an opportunity to be heard.

During the course of submission in the application for the interlocutory injunction, Counsel for Dato' Abdullah Ahmad referred both to the articles of the company and the agreement between SPK and Dato' Abdullah Ahmad at p. 58 as follows:

> In the present case, he was elected Chairman (under the articles) and appointed (Chairman and managing director) by the agreement A1 for a period of three years. In other words, he can only be removed as Chairman subject to the contract.

After Counsel referred to the committee of enquiry appointed by the board of SPK the learned Judge tried to frame the issue before him then as appears in the note as follows:

> What you are trying to say is that his appointment can only be terminated under the agreement and not by this committee of enquiry.

Again during the *inter parte* hearing the same Counsel for Dato' Abdullah Ahmad submitted that:

> What I am trying to say is that the jurisdiction of the Court is established by the statement of claim. What is in issue is the legality of the contract.

The issue was still not crystallised but Counsel during the *inter parte* hearing at p. 73 submitted as follows:

> In the present case the plaintiff was removed from office as Chairman without any reason being given and his executive powers were suspended on vague grounds that an investigation was to be undertaken into the validity of the contract.

What was the background of the conflict? The meeting of the board of SPK on 2 October 1989 was apparently prompted by the wishes of most of the members of the board to refer the agreement back to the general meeting. One of the provisions under the agreement which caused unhappiness was the provision for the payment of RM660,000 as gratuity to Dato' Abdullah Ahmad for three years service under the agreement while the company was not making any profit. The contract between Dato' Abdullah Ahmad and SPK in question was the second contract. The first contract was executed on 4 March 1986 which also appointed Dato' Abdullah Ahmad as Chairman and managing director of SPK until 31 December 1988.

In the affidavit of Dato' H.M. Shah he affirmed that the resolutions to replace the Chairman and suspend his executive powers as managing director were passed in the best interest of the shareholders of SPK. In other words the board wanted to place the matter back to the general meeting to decide under its articles. Matters relating to renumeration of Dato' Abdullah Ahmad were already raised at the annual general meeting of SPK on 30 September 1989 that is barely two days before the meeting of the board.

What appears here is that there was the fact of repudiation which was not accepted and this the learned Judge took as a starting point of his dissertation. Because the matter is still in interlocutory stage the point whether the removal of Dato' Abdullah Ahmad was wrongful or according to contract was raised but never really argued nor dealt with by the Judge. The contract between Dato' Abdullah Ahmad and SPK must also be looked at in the context of the articles of SPK and the Companies Act.

However for the limited purpose of resolving the appeal we have to consider whether the learned Judge was correct in his view of the implied negative stipulation.

The learned Judge affirmed the injunction based on what he found to be an implied negative stipulation in the agreement. In his judgment he said: (Page 44 of the appeal record)

> The defendant company has agreed to employ the plaintiff as its Executive Chairman and managing director until 31 December 1991. The implied negative agreement is that the defendant company will not employ someone else as its Chairman or managing director until the expiry of the plaintiff's period of employment ... The positive agreement by the defendant company to employ the plaintiff as its Executive Chairman and managing director cannot be enforced by specific performance or injunction; see s. 20(1)(b) and s. 54(f) of the Specific Relief Act. As such, I find that there is, therefore, no justification for the injunctions, which concern the plaintiff remaining in office as Executive Chairman and managing director and the exercise by the plaintiff of the powers and duties of the holder of such office, to continue to remain in force. I therefore allow the application to discharge these two injunctions.
>
> In the result, only the first injunction remains, namely, the injunction which restrains the second defendant from exercising the powers and duties of the office of Chairman of the first defendant company.

The first thing to notice here is that the agreement between Dato' Abdullah Ahmad and SPK is not the same as any ordinary employer/employee agreement. In the instant case the agreement contains a number of provisions concerning termination. In clause 1 of the agreement itself it is stated that SPK shall employ Dato' Abdullah Ahmad as an Executive Chairman and managing director and subject to the provisions for determination of the agreement such employment shall be for a period of three years until 31 December 1991. Then we have clause 22 dealing with incapacity and SPK's right to terminate the agreement. Clause 23 deals with summary termination by SPK in certain events. Then there is the arbitration clause 27 which specifically provides for arbitration if any dispute arises from the agreement or in the construction of the agreement. In short, the agreement between SPK and Dato' Abdullah Ahmad is not an ordinary master and servant contract. Other factors come into play and need to be looked into.

True that a negative agreement need not be expressed. It may be implied. The question is only whether a negative covenant can probably be implied in a particular agreement. For this purpose we have to look at the agreement itself. Section 55 of the Specific Relief Act does not say that every affirmative agreement includes by necessary implication a negative agreement to refrain from doing certain things. It is a question of interpretation in each case whether a particular agreement can be said to have a negative covenant, express or implied.

Section 55 of the Specific Relief Act provides as follows:

> 55. Notwithstanding s. 54(f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

> Provided that the applicant has not failed to perform the contract so far as it is binding on him. (Emphasis provided)

In this country an old case *Broome (Selangor) Rubber Plantations v. R.H. Whitley* [1919] 1 FMSLR 365 which was also cited in *Pertama Cabaret Nite Club Sdn. Bhd. v. Roman Tam* [1981] 1 MLJ 149 dealt with s. 55 of the Specific Relief Act 1950. In *Broome (Selangor) Rubber Plantations v. R.H. Whitley* the defendant unilaterally terminated the contract of employment saying that he had a better position elsewhere. His employers sued for an injunction. It was held that under s. 57 of the Specific Relief Enactment then (the forerunner of the present s. 55) the plaintiffs were entitled to an injunction restraining the defendant from entering into employment elsewhere as manager or assistant relying on the implied stipulation. But there the learned Judge found there was no provision in the agreement under which Whitley could determine his service by any such notice.

In an Indian decision *Rubenstein Co. v. Francis* AIR Lahore 597 dealing with s. 57 of the Indian Specific Relief Act (s. 55 of our Act) the judgment reads:

> The learned Counsel for the appellants has relied on s. 57, Specific Relief Act, but that section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is, therefore, a question of interpretation in each case whether a particular contract can be said to have a negative covenant express or implied contained within it. I find a case reported in 75 Law Times, p. 528, which is practically on all fours with this case. There the learned Judges have held that the mere use of the word "exclusively" does not imply service of other people and the learned Judges, therefore, refused the injunction on that ground.

In another Indian decision *Vinod Chandra v. Vivekanand Mills* AIR [1967] Gujarat 255 it was held that:

> The presence of a mere term in the service contract that the employee must work with the company in a particular capacity for a certain number of years will not, by itself, imply a negative stipulation that he ought not to serve any other before the term expires. Something more in the nature of a distinct negative stipulation is necessary before an injunction can issue restraining the defendant from acting contrary to the term.

In *Pertama Cabaret Nite Club Sdn. Bhd. v. Roman Tam* the Federal Court considered clause 15 of the agreement in case of breach or misconduct of the singer and found there was indeed side by side with the stipulation to sing in the appellant's night club for a few days also an undertaking by the singer not to sing elsewhere for a certain period. In *Lumley v. Wagner* [1843] 60 AER 368 too the contract also contained both positive and negative stipulations, the negative stipulation being that the defendant was not to sing for anyone else during the agreed period. The negative stipulation was "superadded" said Lord St. Leonard, LC although he was also of the opinion that:

> even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Also according to the learned Lord Chancellor the jurisdiction to restrain Johanna Wagner from the commission of an act which she had bound herself not to do:

> is wholly within the power of the Court, and being of the opinion that it is a proper case for interfering.

When we speak of the implied stipulation a useful guideline can be found in *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416. There the manager of a manufacturing company agreed to give during a specific term "the whole of his time to the company's business". Lindley, LJ described the principle at p. 426:

> Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will.

It is to be noticed that in each of these cases the implied stipulation was against the employee not the employer. In practice it may perhaps be much more difficult to find in a service contract an implied undertaking operating against an employer.

Returning to our case it is also to be noticed that s. 128 of the Companies Act provides for removal of a director of a public company by ordinary resolution notwithstanding anything in the company's memorandum or in any agreement between the company and the director.

Our conclusion is that an implied stipulation cannot properly be read into the agreement between SPK and Dato' Abdullah Ahmad.

We accordingly allowed the appeal with costs. Immediately after our decision to allow the appeal Mr. Ranjan withdrew the cross-appeal and the cross-appeal was accordingly dismissed but with no order as to costs.

Also found at [1991] 1 CLJ 238